(1)

90-288

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK STATE TEAMSTERS JOINT COUNCIL 18 and VICTOR C. OLIVADOTI,

Petitioners,

v.

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK STATE TEAMSTERS COUNCIL HEALTH & HOSPITAL FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL, JAMES A. HOOD, JOHN PRYSHLAK, NICHOLAS ROBILOTTO, and ERVIN WALKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186 (c)(5), which provides that "employees and employers [be] equally represented in the administration" of joint union-management benefit funds, requires that employee and employer trustees remain accountable to their respective sponsoring group through the right to remove or reappoint the trustees at reasonable intervals.

2. Whether Section 302(c)(5) of the LMRA and Section 404(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a), which provide that trustees act "solely in the interest of participants and beneficiaries," require strict scrutiny of actions by trustees that alter the procedures governing their own removal and reappointment.

PARTIES IN THE COURT OF APPEALS

The parties before the Second Circuit Court of Appeals were New York State Teamsters Joint Council 18 and Victor C. Olivadoti (Petitioners in this Court); and New York State Teamsters Council Health and Hospital Fund, the Trustees of the New York State Teamsters Council Health & Hospital Fund, James M. Carlton, Everett L. Campbell, James A. Hood, John Pryshlak, Nicholas Robilotto and Ervin Walker (Respondents in this Court).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York State Teamsters Joint Council 18 and Victor C. Olivadoti petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 18, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-10a) is reported at 903 F.2d 919. The oral opinion of the district court (App., *infra*, 11a-14a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Section 302 of the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. § 186, and of Section 404 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104, are set forth at App., *infra*, 27a-29a.

STATEMENT

1. The New York State Teamsters Council Health and Hospital Fund ("Fund") is a employee benefit trust established under Section 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and maintained in compliance with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The Fund was created in 1952 by the New York State Teamsters Council and various sponsoring employers. The Fund was established to accept contributions from employers party to collective bargaining agreements with the local unions affiliated with the New York State Teamsters Council and to provide health insurance and related benefits to employees represented by those local unions and working under those agreements. The Fund is a jointly administered trust with four employer and four employee trustees. App., *infra*, 3a; C.A. App. 158-64.[1]

The New York State Teamsters Council, currently known as New York State Teamsters Joint Council 18, is an intermediate labor organization consisting of Teamster local unions in upstate New York (C.A. App. 114). The

[1] "C.A. App." refers to the joint appendix filed in the Court of Appeals.

officers of these local unions are the delegates to the Joint Council. The Joint Council executive board is elected by the delegates once every three years.

Until February 1988, the trust agreement provided that the employee trustees would be chosen "in accord with the rules and regulations" of the Joint Council, would each serve a four-year term, and would "automatically replace themselves . . . for a like term unless removed" by the Council (App., *infra*, 3a-4a). The trust agreement provided that the trustees otherwise could be removed from office only for "malfeasance in office or for any other reason specifically provided in the by-laws of the Board of Trustees" (App., *infra*, 21a; C.A. App. 147, 159).

Until February 1988, employee trustees were in fact periodically reappointed, removed or appointed by the Joint Council 18 executive board with the approval of the local union delegates to the Council (C.A. App. 115, 184-96).[2] Victor C. Olivadoti became Joint Council president in October 1986 and was appointed an employee trustee in September 1987 (C.A. App. 115).

Prior to a meeting of the Fund trustees scheduled for February 23-24, 1988, Trustee Olivadoti was informed that an amendment changing the method of removing and appointing trustees would be proposed for the purpose of protecting one of the other employee trustees, Nicholas Robilotto, from being removed as a trustee by the Joint Council (C.A. App. 116).[3] On February 24, the ~~three~~ two

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[2] Some local unions affiliated with two other Joint Councils—Joint Councils 17 and 46—have contracts with employers that provide for coverage under the Fund. These Joint Councils were not sponsors of the Fund and have never appointed or removed any of the employee trustees. C.A. App. 115, 184-196.

[3] Trustee Robilotto was not an officer or employee of any local union affiliated with Joint Council 18. He had relinquished his right to any union office or position and, in particular, his position as principal executive officer of one of the local unions affiliated with Joint Council 18, in 1983 as the result of an agreement in which

employer and ~~three~~ four employee trustees in attendance voted five-to-one, Trustee Olivadoti dissenting, to amend the trust agreement to change the method of selecting and removing employee trustees (App., *infra*, 4a-5a; C.A. App. 115).[4] The amendment provided that employee trustees would "automatically replace themselves at the end of their regular terms every four (4) years for a like term unless removed as required by law or by unanimous vote of the remaining existing employee trustees." App., *infra*, 4a-5a, 23a-24a.[5] The amendment eliminated Joint Council 18's authority to remove and appoint employee trustees and, as a practical matter, allowed the then sitting trustees, including Robilotto, to retain their positions indefinitely and without the consent of the sponsoring labor organization.

2. Joint Council 18 and Trustee and fund participant Olivadoti brought suit against the Fund and the other trustees alleging that the February 1988 amendment violated Section 302(c)(5) of the LMRA, 29 U.S.C. § 186

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he pled guilty to three counts of filing fraudulent tax returns (26 U.S.C. § 7206(1)). *United States* v. *Robilotto*, No. 81-CR-18 (N.D.N.Y. May 14, 1982); *see Robilotto* v. *Scullen*, No. 83-CV-1291 (N.D.N.Y. June 20, 1985), Slip Op. at 2.

[4] A 1987 amendment to the trust agreement requires a quorum of two employer and two employee trustees and guarantees each group "the same number of votes as the other group" even when it has fewer trustees present (C.A. App. 167).

[5] The February 1988 amendment further provided that employee trustees would cease "to be a trustee in the event they cease to be either (1) an elected local union officer of a participating local union, or (2) a representative of such participating local union officially designated by such local union" and that, in the event of a vacancy, employee trustees would be "nominated by any participating joint council" and selected by a majority vote of the existing employee trustees (App., *infra*, 24a-25a).

The amendment provided similar procedures for selecting and removing employer trustees, "with one significant difference," namely that employer trustees could be removed not only by a unanimous vote of the other employer trustees or "as required by law" but also by a two-thirds vote of the participating employers (App., *infra*, 5a, 24a).

(c)(5), which requires "employees and employers [be] equally represented in the administration" of joint union-management benefit funds, by eliminating the Joint Council's "right both to appoint and remove union trustees" and by allowing "the current union trustees to serve as long as they wished without answering to the Council for their administration of the trust" (C.A. App. 8-9). The complaint also alleged that the defendant trustees violated Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1), which requires trustees to act for the "sole and exclusive benefit" of Fund participants, by adopting the amendment "so that one or more trustees could perpetuate their positions on the Board of Trustees" (C.A. App. 9).

Joint Council 18 and Trustee Olivadoti noticed discovery including the depositions of Robilotto and other trustees, but the district court stayed discovery pending decision on the defendants' motion for summary judgment. The district court granted that motion. In an oral opinion, the district court ruled that Section 302(c)(5) of the LMRA requires only that employers and employees "be represented by an equal number of trustees" and found "nothing on the face of the Trust Agreement, as amended, which could lead this court to conclude that it creates a structure where either the unions or the management could dominate the Board." App., *infra*, 13a. The district court ruled that the amendment did not violate Section 404(a)(1) of ERISA because it did not violate Section 302(c)(5) of the LMRA and because it did not create the possibility of future abuse (App., *infra*, 13a-14a).[6]

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[6] Joint Council 18 and Trustee Olivadoti objected that their claims could not be dismissed on summary judgment because material facts, including the motive of the trustees for changing the method of removing and selecting employee trustees, were disputed and discovery had been pretermitted. C.A. App. 84, 95-98. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) (nonmoving party should not be "railroaded" through denial of adequate opportunity for discovery).

3. On appeal, the United States Court of Appeals for the Second Circuit affirmed. The court held that the equal representation requirement of Section 302(c)(5) of the LMRA "is aimed at balancing the interests of employers as a group with employees as a group" and "is not concerned with the allocation of power within either group." App., *infra*, 6a. The court found that neither the fact that Joint Council 18 had lost its authority to appoint and remove employee trustees nor the fact that this authority had been "disseminated among other joint councils and local unions" affected the required balance (App., *infra*, 6a-7a). To the contrary, the court found that this dispersion of authority "increases rather than decreases accountability of the employee trustees." App., *infra*, 7a.

With respect to plaintiffs' claim under ERISA Section 404(a)(1), the court held that the amendment "should not be disturbed absent a showing of bad faith or arbitrariness." App., *infra*, 9a, *citing Miles* v. *New York State Teamsters Conference Pension and Retirement Benefit Plan*, 698 F.2d 593 (2d Cir. 1983). The court of appeals affirmed the district court's dismissal of this claim because it found plaintiffs' "accusation" that "the trustees adopted the amendment to frustrate attempts to remove them" was "unsupported." App., *infra*, 8a.

REASONS FOR GRANTING THE PETITION

Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), requires that "employees and employers [be] equally represented in the administration" of joint union-management benefit funds. This equal representation requirement was designed by Congress to impose a "quasi-adversarial" scheme of administration in which the differing views of employee and employer trustees "would provide safeguards against trust fund corruption." *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d 222, 228 (3d Cir. 1977). This scheme cannot operate successfully unless employee and employer

trustees are held accountable to the group whose interests they have been appointed to represent. The court below erred in ignoring this fundamental aspect of the equal representation requirement and in approving a trust amendment that eliminated the accountability of employee trustees to the sponsoring labor organization.

Moreover, both the important role of Section 302(c)(5)'s structural requirements in preventing the possible abuse or misuse of trust fund assets and the exacting fiduciary obligations imposed on trustees by Section 404(a)(1) of ERISA require "strict scrutiny" of any action by trustees that alters the procedures that govern their own removal and appointment. Under this strict standard, the facts presented to the courts below established a prima facie violation and made summary judgment improper. The court below therefore erred when it applied the lesser "bad faith or arbitrariness" standard and affirmed summary judgment dismissing Petitioners' complaint.

These issues warrant review because, in these respects, the decision of the court below conflicts with the decision of the Third Circuit Court of Appeals in *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d 222 (1977), and because these issues are of fundamental importance in insuring the proper administration of thousands of jointly administered trusts and protecting the hundreds of billions of dollars of assets these trusts hold for the benefit of millions of working men and women throughout the country.[7]

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[7] Petitioners respectfully suggest that the Court request the Department of Labor to express its view concerning the issues presented by this petition. Such a request is appropriate given that the Department of Labor is responsible for the public enforcement of both of the statutes here at issue and, in particular, has issued an advisory opinion in which it stated that a "lifetime term of appointment" for a trustee would be "inconsistent with ERISA's fiduciary responsibility provisions," that a procedure that allowed "a plan

1. Section 302(c)(5) of the LMRA, 29 U.S.C. § 186 (c)(5), requires that "employees and employers [be] equally represented in the administration" of joint union-management benefit funds (App., *infra*, 27a-28a). The requirement of equal representation was designed to prevent misuse of the "vast amounts of money" controlled by these funds. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981). *See Denver Metropolitan Ass'n* v. *Journeymen Plumbers*, 586 F.2d 1366, 1374 (10th Cir. 1978); *Holcomb* v. *United Automotive Ass'n*, 852 F.2d 330 (8th Cir. 1988).[8]

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sponsor" to "appoint a successor trustee only upon successfully bringing such charges as misfeasance or incapacity to perform the duties of the position" tends to "frustrate[]" the principles embodied in ERISA, and that "[l]imited terms, such as for a specified number of years, . . . generally would be consistent with ERISA." Pension & Welfare Benefits Opinion Letter 85-41A, U.S. Dep't of Labor (Dec. 5, 1985).

[8] There is no merit to the suggestion made below by Respondents (Brief to the Court of Appeals, at 16) that the equal representation requirement prohibits only union abuse and not employer abuse of trust fund assets. The wording of Section 302(c)(5) explicitly refers to trust funds in which "employees and employers are *equally* represented in the administration of such fund[s]" (emphasis added). Although the impetus for enactment of Section 302 was the desire by Congress to prevent union abuses of trust fund assets (*Arroyo* v. *United States*, 359 U.S. 419, 425-26 (1959)), there is nothing in the legislative history to suggest that when Congress used the word "equally" it meant anything other than strict equality of representation. Although this Court has not squarely addressed this precise issue, the lower courts have uniformly recognized that Section 302(c)(5) applies to prevent both union and employer domination and abuse. *See, e.g., Holcomb* v. *United Automotive Ass'n*, 852 F.2d 330 (8th Cir. 1988) (union entitled to equal representation); *Denver Metropolitan Ass'n* v. *Journeymen Plumbers*, 586 F.2d 1366, 1374 (10th Cir. 1978) (court may require different method of appointment "if it appears that the unions (or employers) dominate the trustees, so that there is not truly equal representation of employers and employees"); *Teamsters Local 145* v. *Kuba*, 631 F. Supp. 1063 (D. Conn. 1986); *Mobile Bldg. and Constr. Trades Council* v. *Daugherty*, 684 F. Supp. 270 (S.D. Ala. 1988).

The equal representation requirement operates to achieve this goal by imposing a "quasi-adversarial" system of administration in which employee and employer trustees, "[i]nsofar as it is consistent with their fiduciary obligations," are "expected to advance the interests" of their respective groups. *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d 222, 228 (3d Cir. 1977); *see Lamb* v. *Carey*, 498 F.2d 789, 793 (D.C. Cir. 1974); *Toensing* v. *Brown*, 374 F. Supp. 191, 195-96 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 901, 921-923 (1970). The efforts of trustees are not only "legitimate" but "essential" to the operation of Section 302(c)(5), for "Congress envisioned the conflict of views as a distilling process which would provide safeguards against trust fund corruption." *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d at 228.

Plainly, this system of "checks and balances" was "designed to be a prophylactic rule that would check abuses of trust before they could occur and possibly jeopardize the benefits of plan participants." *Teamsters Local 145* v. *Kuba*, 631 F. Supp. 1063, 1070 (D. Conn. 1986); *accord Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d at 227; *Employing Plasterers' Ass'n* v. *Journeymen Plasterers' Local 5*, 279 F.2d 92, 97 (7th Cir. 1970); *Quad City Builders Ass'n* v. *Tri City Bricklayers Local 7*, 431 F.2d 999, 1003 (8th Cir. 1970); *Mobile Bldg. and Constr. Trades Council* v. *Daugherty*, 684 F. Supp. 270, 281-82 (S.D. Ala. 1988).

The essential point here, and one on which the Court has not spoken, is that the equal representation clause of Section 302(c)(5) necessarily requires that employee and employer trustees remain accountable to the group whose interests they have been appointed to represent. Accountability is an intended and essential element of the statutory scheme that follows naturally and directly from

the wording of the statute and the character of the system of checks and balances envisioned by Congress.

The wording of the statute contemplates that employee and employer trustees will act to some degree as the "representatives" of their respective groups. The equal representation clause requires that "employees and employers are equally *represented* in the administration" of the fund, and the immediately following clause, which allows employee and employer trustees to select additional neutral trustees, explicitly identifies the trustees as the "*representatives* of the employers and the *representatives* of employees." App. *infra*, 27a, 29 U.S.C. § 186(c)(5) (emphasis added). Accountability is a necessary part of any concept of representation. Without accountability there is no guarantee that the representative will continue to reflect the interests of the represented.[9]

Accountability is equally essential to the proper operation of the system of checks and balances embodied in the equal representation requirement. As shown, this system operates on the fundamental premise that "consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer[s]

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[9] We recognize that the Court held in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), that the employer trustees of a jointly administered fund are not " 'representatives' of the employer 'for the purposes of collective bargaining or the adjustment of grievances' within the meaning of § 8(b)(1)(B)" of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B). This holding neither answers nor forecloses the issue presented here, for we do not contend that trustees act either as bargaining representatives or as agents for their respective sponsoring groups. Rather, we contend, consistent with the statute, that, to the degree permitted by their fiduciary obligations, trustees are expected to reflect the often differing interests of their respective sponsoring groups in much the same way that an elected official represents the interests of his or her constituency. Neither this degree of representation nor the periodic accountability that its effective operation requires is precluded by the Court's decision in *Amax Coal*.

and employee trustees are expected to further the interests of the union[s]." *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d at 228. The absence of accountability undermines this premise and with it the entire system.

2. Both LMRA Section 302(c)(5) and the exacting fiduciary standards imposed by ERISA Section 404(a), 29 U.S.C. § 1104(a), require strict scrutiny of actions by trustees that alter the procedures governing their own removal and reappointment.

That Section 302(c)(5) requires such searching review follows from the critical importance of Section 302(c)(5)'s structural requirements. The purpose of these requirements is to prevent abuses before they occur, before participants and beneficiaries are injured, and before fund assets are lost. If these requirements are ignored or less than vigorously enforced, the door will be open to abuse and misuse. Participants and beneficiaries may be injured and assets lost or squandered before the wrong is discovered and remedied. *See, e.g., Teamsters Local 145* v. *Kuba*, 631 F. Supp. at 1070; *Toensing* v. *Brown*, 374 F. Supp. at 195. It is to fulfill this critical purpose that, as the Third Circuit Court of Appeals held in *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d at 227:

> Any amendment . . . which even slightly restructures the representation of employers and employees in the fund administration must be carefully scrutinized, not merely for technical compliance with the statutory standard but for meaningful adherence to the Congressional command.

Faithful adherence to the requirements of Section 302(c)(5) therefore demands that courts carefully scrutinize not only the formal procedures implemented by such amendments but also their practical effects to determine whether they undermine accountability and pose a "very

real possibility" of "abuse" or "domination" by one group or the other. *Id.*

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), requires trustees to act "solely in the interest of participants and beneficiaries" (App., *infra*, 29a). *NLRB* v. *Amax Coal Co.*, 453 U.S. at 332; *Donovan* v. *Bierwirth*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982). This strict fiduciary standard applies when trustees "have sacrificed valid participant interests to advance the interests of non-beneficiaries." *Struble* v. *New Jersey Brewery Employees Welfare Trust*, 732 F.2d 325, 333 (3d Cir. 1984). This category includes "dual loyalty" cases in which the trustees are alleged to have acted to benefit the employer, the union or themselves. *E.g.*, *Struble* v. *New Jersey Brewery Employees Welfare Trust*, 732 F.2d at 333 (giving surplus assets back to contributing employers); *Donovan* v. *Bierwirth*, 680 F.2d at 272 ("high standard of duty" where position as trustee conflicted with position as corporate officer during takeover bid); *Kuba*, 631 F. Supp. at 1071 (amendment providing that trustees could be removed only for cause); *Dependahl* v. *Falstaff Brewing Corp.*, 491 F. Supp. 1188, 1197 (E.D. Mo. 1980), *aff'd in relevant part*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (amendment to severance pay plan restricting eligibility on eve of mass reduction in the employer's workforce). A lesser standard applies where the alleged breach involves a decision to modify or deny benefits. *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S.Ct. 948 (Feb. 21, 1989) ("de novo" or "abuse of discretion" depending on the terms of the plan); *see Struble* v. *New Jersey Brewery Employees Welfare Trust*, 732 F.2d at 333 (citing cases).[10]

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[10] *Firestone* involved a claim for benefits under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The Court there noted that it "express[ed] no view as to the appropriate standard of review under other remedial provisions of ERISA." 109 S.Ct. at 953.

Petitioners alleged that the defendant trustees adopted the February 1988 amendment to protect one or more of them from possible removal. It is plain that this case falls into the first category and not the second and that a strict standard of review therefore must be applied.

3. Strict review of the February 1988 amendment shows that it violated the structural requirements of Section 302(c)(5) by eliminating any meaningful accountability of the employee trustees to the employees they were appointed to represent and that its adoption established a prima facie breach of the defendant trustees' fiduciary obligations.

Thus, prior to the amendment, the right of employee trustees to continue to sit as trustees was subject to periodic review by the sponsoring labor organization. This review was accomplished through the Joint Council executive board and the action of the local union delegates to the Joint Council. Under the amendment, sitting employee trustees could only be removed "by unanimous vote of the remaining existing employee trustees," "as required by law," or by action of their local union (App., *infra*, 4a-5a, 23a-25a). Removal "as required by law" does not serve the prophylactic purpose of the structural requirements of Section 302(c)(5) because it occurs after the breach has already been committed.[11] Removal by action of the remaining employee trustees does nothing to insure that a trustee remains accountable to employees, to the sponsoring labor organization or to the participating unions. Removal by action of the trustee's own local union, whether by loss of office or by loss of designation,

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[11] The Department of Labor has stated its view that a procedure that allows removal of a trustee "only upon successfully bringing such charges as misfeasance or incapacity to perform the duties of the position" "frustrates" the principles embodied in ERISA. Pension & Welfare Benefits Opinion Letter 85-41A, U.S. Dep't of Labor (Dec. 5, 1985). *See Teamsters Local 145* v. *Kuba*, 631 F. Supp. 1063, 1071 (D. Conn. 1986) (such a procedure violates LMRA Section 302(c)(5)).

makes the trustee accountable to but one small segment of the employee group he has been appointed to represent. As practical matter, the February 1988 amendment eliminated any meaningful accountability.

That the practical effect of the amendment was to eliminate meaningful accountability of the sitting trustees to the employee group they were appointed to represent is, by itself, sufficient to show that the amendment and the action of the defendant trustees in adopting it violated their fiduciary obligations. The additional facts that the amendment had not previously been discussed, that Trustee Olivadoti was informed before the February 1988 meeting that the purpose of the amendment was to prevent removal of Trustee Robilotto, that the amendment in fact had this effect, and that there was no other persuasive reason for changing the means of removing and appointing employee trustees further strengthened Petitioner's claim that adoption of the amendment violated both LMRA Section 302(c)(5) and ERISA Section 404(a)(1).[12]

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[12] There is no support for the assertion made below by Respondents (Brief to the Court of Appeals, at 8-9) that the purpose of amending the method of selecting employee trustees was to "conform the language of the Trust Agreement to the . . . settlement" in *New York State Trucking Employers Ass'n, Inc.* v. *DePerno*, No. 86-CV-234 (N.D.N.Y.). The substance of the settlement reached in that case on February 25, 1987, was quoted by Respondents in their brief below (at 8):

> The Union Trustees agree that they will not participate or become involved in any way in the process of selecting, seating or removing the Employer Trustees . . . and the Employer Trustees agree that they will not participate or become involved in any way in the process of selecting, seating or removing Union Trustees . . . .

This settlement occurred a full year before the February 1988 amendment was proposed and provides not the faintest excuse for eliminating the role of Joint Council 18 in the removal or selection of employee trustees.

Under the appropriate standard of review, and with a proper appreciation for the fundamental importance of the principle of accountability, Petitioners demonstrated the prima facie validity of their claims. Summary judgment should have been denied, and having been granted, should have been reversed. The contrary result in the court below resulted from its failure to recognize the fundamental importance of accountability and its failure to strictly scrutinize the February 1988 amendment to determine whether it violated this important principle.

4. The decision below conflicts with the decision of the Third Circuit Court of Appeals in *Associated Contractors* v. *Laborers Int'l Union*, 559 F.2d 222 (1977). As noted above, *Laborers* requires strict scrutiny of any amendment that "even slightly restructures the representation of employers and employees in the fund administration . . . ." *Id.* 227. The Third Circuit Court of Appeals' decision demonstrates that this standard of review requires not just attention to the numerical equality of representation but also a searching inquiry into the practical effect of changing the allocation of power within either the employer or employee group. *Id.* 226-29. In particular, the Third Circuit Court of Appeals held that the amendment before it—which eliminated the sponsoring employer association's right to select all the employer trustees and provided that two trustees would be selected by the sponsoring employer association and two by a newly organized rival association—violated the equal representation requirement because, under the circumstances, it created a "potential for union abuse" by making it possible for a united group of union trustees to dominate the trust through an "alliance" with one or the other of the employer associations. *Id.* at 228-29.

The decision of the court below conflicts with *Laborers* both in the standard applied and in its application. Contrary to *Laborers*, the court below ruled that Section 302(c)(5) did not require it to examine "the allocation

of power within either [the employee or the employer] group" (App., *infra*, 6a). Contrary to *Laborers*, the court below refused to apply a standard of strict scrutiny and instead applied the lesser "bad faith or arbitrariness" standard (App., *infra*, 9a). Contrary to *Laborers*, the court below confined itself to examining the formal procedures implemented by the disputed amendment and failed to examine the practical effect of those procedures on the loyalties of the sitting trustees. And although *Laborers* concluded that a split in appointive power between employer associations created the potential for union abuse, the court below rejected on summary judgment the notion that dividing removal power among numerous local unions could lead to domination or abuse through an alliance between a united group of employer trustees and one or more employee trustees. Review is warranted to resolve the conflict on these issues between the Third Circuit Court of Appeals and the court below.

5. The issues presented in this petition are of national concern. The Department of Labor oversees approximately 5.5 million employee benefits plans with $2 trillion in assets. The Department is currently able to investigate less than 3,000 plans each year. Fiduciary violations are found in one-fourth of the plans reviewed. H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 432-33, *reprinted in* 1989 U.S. Code Cong. & Admin. News 3035-36.[13] In amending ERISA to increase the civil penalty for certain fiduciary violations from 5 to 20 percent, Congress stated (*id.*):

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[13] Similar statistics limited to jointly-administered funds are not readily available. Recent figures show, however, that more than 3,000 collectively bargained private pension plans were in existence in 1985, that these plans had almost 6.5 million participants, and that, as of 1987, collectively bargained pension plans held more than $160 billion in assets. U.S. Department of Labor, Pension and Welfare Benefits Administration, *Trends in Pensions* 14 (Table 1.4), 53 (Table 4.1) (GPO 1989). On the average, each of these plans has

> [T]he need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well. The conferees expect that the executive agencies and the courts will use their substantial authority to achieve these goals and to safeguard the rights of plan participants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BAPTISTE
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Attorneys for Petitioners

August 1990

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more than 2000 participants and hold $50 million in assets; these plans are, of course, governed by the same statutory provisions that are at issue here.

APPENDICES

APPENDICES

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 535, 572—August Term 1989

Argued: December 18, 1989 Decided: May 18, 1990

Docket Nos. 89-7674, 89-7708

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, JOINT COUNCIL 18 and VICTOR C. OLIVADOTI,
Plaintiffs-Appellants-Cross-Appellees,

—against—

THE NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK STATE TEAMSTERS COUNCIL HEALTH & HOSPITAL FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL, JAMES A. HOOD, JOHN PRYSHLAK, NICHOLAS ROBILOTTO, ERVIN WALKER,
Defendants-Appellees-Cross-Appellants.

Before:

OAKES, *Chief Judge*,
PRATT, *Circuit Judge*, and
Leonard B. Sand, *District Judge* for the Southern District of New York, sitting by designation.

Appeal by plaintiffs from summary judgment of United States District Court for Northern District of New York, Neal P. McCurn, *Chief Judge*, holding that amendment to trust agreement governing employee benefit fund violates neither Labor Management Relations Act nor Employee Retirement Income Security Act. Cross-appeal by defendants from denial of attorneys fees and costs.

Appeal affirmed; cross-appeal reversed and remanded.

ROBERT M. BAPTISTE, Washington, DC (Baptiste & Wilder, P.C., Roland P. Wilder, Jr., Christy Concannon, Baker, Clark & Satter, Syracuse, NY, Mimi C. Satter, of Counsel), *for Plaintiffs-Appellants-Cross-Appellees.*

JAMES J. KELLY, Washington, DC (Morgan, Lewis & Bockius, Thomas K. Wotring, Kevin L. Wright, Blitman & King, Syracuse, NY, Bernard T. King, Jules L. Smith, of Counsel), *for Defendants-Appellees-Cross-Appellants.*

PRATT, *Circuit Judge*:

On these cross-appeals, we are asked to decide two issues. The first is whether a redistribution of the power to appoint and remove the employee trustees of an employee benefit fund violates either the Labor Management Relations Act ("LMRA") or the Employee Retirement Income Security Act ("ERISA"). Because we conclude that the challenged amendment has no impact on the distribution of power between employer trustees and employee trustees, we hold that it violates neither LMRA nor ERISA. The second issue is whether the defendants are entitled to attorneys' fees. Because the district court did not state any reasons for its denial of this request, we remand on this issue.

Joint Council 18 of the International Brotherhood of Teamsters ("Joint Council 18") and Victor C. Olivadoti, who is president of Joint Council 18 and a trustee of the New York State Teamsters Council Health and Hospital Fund (the "fund"), appeal from a summary judgment of the United States District Court for Northern District of New York, Neal P. McCurn, *Chief Judge*, dismissing their claim that an amendment to the fund trust agreement, implemented on February 24, 1988, violated LMRA and ERISA. The fund and its remaining trustees, the defendants in the district court, cross-appeal from the district court's refusal to award them attorneys' fees and costs. For the reasons that follow, we affirm the dismissal of plaintiffs' claims, but remand the action to the district court for appropriate findings with regard to its denial of attorneys' fees and costs.

BACKGROUND

The fund is a welfare benefit trust fund established pursuant to § 302(c)(5) of LMRA, 29 U.S.C. § 186(c)(5) (1978), and maintained in compliance with ERISA, 29 U.S.C. § 1104(a)(1)(B) (1985). It was created in 1952 to provide health benefits to employees through contributions made by participating employers in accordance with collective bargaining agreements between the employers and local unions. The original trust agreement was executed by employer trustees appointed by contributing employers and employee trustees appointed by the New York State Teamsters Council, later redesignated as Joint Council 18. At that time Joint Council 18 was comprised of all the local teamsters unions in New York State located outside of New York City. The trust agreement has been amended from time to time.

From 1976 to 1988, the fund was administered by a board of trustees consisting of four employee representatives and four employer representatives. Under the trust agreement, employee trustees were chosen in accordance with the rules and regulations of Joint Coun-

cil 18 and were automatically replaced by Joint Council 18 at the end of their regular four-year terms "unless removed by [Joint Council 18]." Employer trustees, by contrast, were selected and subject to removal by representatives of participating employers. These representatives were chosen by "[t]he Board of Trustees as a whole".

In 1986 the employer trustees and the New York State Trucking Employers Association sued the employee trustees in federal district court, alleging that the procedures used to select the employer trustees for the fund improperly allowed the employee trustees to participate in the selection. *New York State Trucking Employers Ass'n, Inc. v. DePerno*, No. 86-CIV-234 (N.D.N.Y.). That action was settled in February of 1987, under an agreement that provided in part that the employee trustees would "not participate or become involved in any way in the process of selecting, seating or removing the Employer Trustees to the [fund]". The settlement also provided that the employer trustees would refrain from any involvement in the selection or removal of employee trustees.

On February 24, 1988, the board of trustees adopted, by a five to one vote, an amendment to the trust agreement that changed the selection and removal process for trustees. Of particular relevance to this lawsuit, the amendment eliminated the unilateral authority of Joint Council 18 to designate employee trustees. Instead, the amendment distributes that power among the local unions participating in the fund and the three joint councils that represent these local unions. Specifically, whenever a vacancy exists, the three joint councils separately nominate prospective replacements, who must be either elected officers or designated representatives of a participating local union. The existing employee trustees then select, by majority vote, a new trustee from the list of those nominated by the councils. No local union may have more than one trustee on the board at any time.

The procedure for removing employee trustees was also significantly altered. Under the amended agreement, employee trustees are automatically replaced at the end of their regular four-year terms, "unless removed as required by law or by unanimous vote of the remaining existing employee Trustees." An employee trustee must also be replaced if he ceases to be an elected officer or designated representative of one of the participating locals.

Procedures for selecting and removing employer trustees are similar to those for employee trustees, with one significant difference: employer trustees can be removed "by a vote of two-thirds or more of the employers who contribute to the Fund". Employee trustees, by contrast, are not subject to removal by a two-thirds, or any other, vote of the local unions.

Joint Council 18 and Olivadoti, the one trustee who voted against the amendment, filed the present action against the fund and the remaining trustees on January 17, 1989. They claimed that the amendment violated both the equal representation and "rational nexus" requirements of LMRA, and constituted a breach of the trustees' fiduciary duties under ERISA. Defendants counterclaimed to recover attorneys' fees and costs. On May 31, 1989, the district court granted summary judgment in favor of defendants on the LMRA and ERISA claims, but denied defendants' request for attorneys' fees and costs. Joint Council 18 and Olivadoti appeal the dismissal of their LMRA and ERISA claims; defendants appeal the denial of fees and costs.

DISCUSSION

A. *LMRA Claims.*

Joint Council 18 and Olivadoti contend that the new procedure for appointing and removing employee trustees upsets the balance of power in the administration of

the fund and therefore violates the equal representation requirement of § 302 of LMRA, 29 U.S.C. § 186(c)(5). They also argue that the amendment does not further the purposes of § 302: they claim that by stripping Joint Council 18 of its accustomed power to designate employee trustees, the amendment makes the removal of these trustees more difficult, and this, they claim, creates the potential for abuse.

Section 302(c)(5) of LMRA exempts from its criminal prohibitions employer contributions to employee benefit funds that satisfy certain structural requirements. One of these requirements is that employees and employers must be "equally represented" in the administration of the fund. This equal representation requirement provides an important safeguard against trust fund corruption by "prevent[ing] any misuse of those funds by union officers who would otherwise have sole control over vast amounts of money contributed by the employer." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981).

Section 302 requires that employers and employees be equally represented on a fund's board of trustees. The statute is aimed at balancing the interests of employers as a group with employees as a group; it is not concerned with the allocation of power within either group. The section "only requires equality between the trustees representing the unions and those representing the employer, and not parity between the representatives of each union." *Culinary & Service Employees Union, AFL-CIO Local 555 v. Hawaii Employee Benefit Administration, Inc.*, 688 F.2d 1228, 1231-32 (9th Cir. 1982). For this reason, the section is not relevant to disputes among union factions.

Under the challenged amendment, Joint Council 18 has lost its dominant power over employee trustees. This power has now been disseminated among other joint councils and local unions. But the amendment did not

affect the balance of power between employers and employees; they are still equal as required by the statute. While Joint Council 18's historical control of the selection and removal process has been eroded by the amendment, this shift in power toward other councils and the local unions increases rather than decreases accountability of the employee trustees, for there are ample opportunities under the amendment to remove employee trustees. Employee trustees can be removed "as required by law" or by "unanimous vote of the remaining existing employee Trustees" and a trustee must be removed if he ceases to be either "an elected local union officer of a participating local union, or a representative of such participating local union officially designated by such local union."

Seeking to support their argument that the amendment violates the "equally represented" standard of § 302, Joint Council 18 and Olivadoti point to two district court cases: *Mobile, Alabama-Pensacola, Florida Building and Construction Trades Council v. Daugherty*, 684 F. Supp. 270 (S.D. Ala. 1988), and *Teamsters Local No. 145 v. Kuba*, 631 F. Supp. 1063 (D. Conn. 1986). However, in both these cases, where courts rejected amendments to provisions for appointment and removal of trustees, employee trustees had adopted provisions designed to prevent their own removal. The amendment that Joint Council 18 and Olivadoti contest has the opposite effect—it makes easier the removal of employee trustees and is therefore consistent with the objectives of § 302.

Joint Council 18 and Olivadoti also claim that the motive of the defendants in adopting the amendment was to permit the incumbent trustees to retain their positions and that the amendment therefore has no rational nexus to the requirement of § 302 that a fund be maintained "for the sole and exclusive benefit of the employees". As already noted, however, the amendment tends

to further the interests of LMRA by dispersing the appointing and removing power more widely among the employees. *See Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (In passing LMRA, Congress was concerned about "the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."). Because the amendment properly furthers this important interest, we see no reason to probe further into the motives of the trustees in adopting it.

B. *ERISA Claim.*

Joint Council 18 and Olivadoti base their ERISA argument on the same unsupported accusation they advance in the context of their LMRA argument—that the trustees adopted the amendment to frustrate attempts to remove them. ERISA requires a trustee to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aim". 29 U.S.C. § 1104(a)(1)(B). Joint Council 18 and Olivadoti assert that the trustees' adoption of an amendment that made their removal more difficult was imprudent and a violation of their fiduciary duty. As we have seen, however, the amendment tends to reduce, not increase, the opportunities of employee trustees to entrench themselves. In addition, the minutes of the February 24th meeting clearly indicate that the amendment was adopted, at least in part, as a response to the lawsuit that had challenged the process for selecting trustees, a fact that suggests that the amendment was not adopted cavalierly, unthinkingly, or without regard for its legal consequences. For these reasons, the amendment does not violate the trustees' fiduciary duty under ERISA.

As we stated in *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593 (2d Cir. 1983), "lawful, discretionary acts of a pension committee should not be disturbed, absent a showing of bad faith or arbitrariness." *Id.*, at 599 (Citations omitted). Plaintiffs here have failed to meet their burden of showing that the trustees acted illegally, in bad faith or arbitrarily. LMRA and ERISA provisions cannot be used as weapons in battles between union factions. The challenged amendment affects only the distribution of power among the unions and the unions' joint councils, and it does not operate to entrench the employee trustees. Since it was adopted with proper prudence and diligence and to achieve a legitimate purpose, the amendment does not violate the requirements of either LMRA or ERISA.

C. *Attorneys' Fees and Costs.*

Having prevailed on the ERISA claim, the defendants assert that they are entitled to attorneys' fees under § 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1). The defendants claim that the litigation was unjustified and so Joint Council 18 should bear its cost. Ordinarily, district courts apply a five-factor test when determining whether attorneys' fees are appropriate. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987). While the awarding of attorneys' fees "is discretionary, not mandatory", *Fase v. Seafarers Welfare and Pension Fund*, 589 F.2d 112, 116 (2d Cir. 1978), whichever way it exercises its discretion, a district court should make specific findings regarding the matter. *Cf. Klein v. Shields & Co.*, 470 F.2d 1344, 1348 (2d Cir. 1972) (holding that in a case involving attorneys' fees under Section 11(e) of the Securities Act of 1933, the district court erred when it failed to articulate findings of fact and conclusions of law with respect to attorneys' fees).

Because the district judge failed to articulate any reason for his decision to deny attorneys' fees, we remand with a direction to make appropriate findings on the issue. We recognize the broad discretion a district court has in making this ultimate determination, and we express no opinion on the merits of the question.

CONCLUSION

The district court's dismissal of Joint Council 18 and Olivadoti's claims is affirmed. The cross-appeal is remanded to the district court to make appropriate findings on the attorneys' fee issue.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Plaintiffs,

vs

THE NYS TEAMSTERS COUNCIL HEALTH & HOSPITAL FUND, *et al.*,
Defendants.

Excerpt from proceedings held on May 31, 1989 in Federal District Court in the Northern District of New York before the Honorable NEIL P. McCURN.

APPEARANCES

THE LAW OFFICES OF ANTONIO FAGA
Attorneys for the Plaintiffs
By: ROBERT M. BAPTISTE, ESQ.
MIMI C. SATTER, ESQ.

BLITMAN & KING
By: BERNARD T. KING, ESQ.
JAMES J. KELLY, ESQ.
JULES L. SMITH, ESQ.

* * * *

[2] (The court was called to order at 4:37 p.m.)

THE COURT: All right. The Court has reviewed the papers in support of an opposition to the motions for a judgment on the pleadings or in the alternative for summary judgment in this matter and has listened to the arguments of counsel and has reviewed the applicable law. The following constitutes the Court's decision therein. Plaintiffs bring this action seeking declaratory and injunctive relief on the grounds that recent amendments to the New State Teamsters Council Health and Hospital Funds Trust Agreement violate: One, the equal representation requirements for trust fund administration under Section 302(c)(5) of the LMRA, 29 U.S.C. Section 186(c)(5). Two, the trustees fiduciary obligations under the Employee Retirement Income Security Act Section 404(a)(1)(B), 29 U.S.C. Section 1104(a)(1)(B).

As thoroughly detailed in the litigation papers, the challenged amendments operated to change the process by which the Trustees of the Defendant Trust Fund are selected and are subject to removal. The plaintiffs assert [3] that these changes constitute a violation of the above-named provisions of ERISA and LMRA.

Today this court addresses the defendant's motion for judgment on the pleadings or in the alternative for summary judgment. Both parties have treated this motion as one for summary judgment, and the Court will address defendant's motion in the same manner. All facts alleged by the plaintiffs have been taken as true. This court finds, however, that there are no facts material to the resolution of this dispute which are actually in dispute. LMRA Section 302(c)(5).

The purpose of Section 302(c)(5) is to assure that trust funds of the sort at issue in this action—strike that, in this action. Of the sort at issue in this motion are governed by a Board which is not subject to the domination of either labor or management. The provi-

sion, in essence, simply requires that the employers and employees be represented by an equal number of trustees. The provision was not, emphasized, created as a mechanism to resolve disputes among competing union groups for more active participation in the selection of trust fund trustees. See *Culinary & Service Employees* [4] *Union v. Hawaii Employees Benefits Fund*, 688 F.2d 1228, 1231-32. There is nothing on the face of the Trust Agreement, as amended, which could lead this court to conclude that it creates a structure where either the unions or the management could dominate the Board. Plaintiffs' main assertion that the amendments unlawfully strip Joint Council 18 of the power to remove a trustee lacks merit. There is no 302(c)(5) violation simply by virtue of the fact that one faction of the Teamsters Union has had its power removed. Section 302(c)(5) concerns whether there is an imbalance of power between labor and management in the selection of trustees, not, emphasized, to the appointment powers of the various union factions. Moreover, a reading of the amendments shows that there is ample opportunity for the employee trustees to be removed from their position. This included: One, a unanimous vote of the other employee trustees on the Board; two, removal as permitted under law; and three, removal if the trustee no longer is an officer or a duly designated representative of one of the 18 participating local teamsters unions.

ERISA Section 404(a)(1)(B). [5] This section of ERISA deals with the Fund Trustee's fiduciary obligation. Plaintiffs' claim that by enacting the amendments to the Trust Agreement, the members of the Board breached their fiduciary obligations by: One, self-dealing through an enactment which made themselves permanent members of the Board, an act illegal under Section 302(c)(5) of the LMRA; two, by acting without advice of counsel; and three, by setting up a structure where future abuse was inevitable.

This court has already found that the amendment to the Trustee Fund Agreement was not illegal under Section 302(c)(5). Further, even if the Court accepts the view of the plaintiffs that the Board acted without the advice of counsel, such an action without the advice of counsel is not necessarily a breach of a fiduciary obligation. Boards may act without counsel and still act as a fiduciary. Finally, the potential for abuse exists in any situation. This court, however, does not find that the structure of the Board of Trustees sets up a potential for abuse which would not be there under any other structure. The many ERISA enforcement provisions [6] and disclosure requirements serve the purpose of keeping trustees within ERISA's dictates. Accordingly, defendant is entitled to summary judgment as a matter of law and will be so ordered. I have signed an order to that effect. I do not grant costs or reasonable attorneys' fees. Court's in recess.

THE CLERK: Court's adjourned.

(The court adjourned at 4:50 p.m.)

* * * *

[7] CERTIFICATE

I, SCOTT D. BOND, do certify that as a Notary Public in the State of New York, I attended and reported the above-entitled proceedings; that I have compared the foregoing with my original minutes taken therein, and that it is a true and correct transcript thereof.

/s/ Scott D. Bond
SCOTT D. BOND
Notary Public in and for
the State of New York.

My Commission Expires:

April 29, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 89-CV-048 (McCurn)

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, JOINT COUNCIL 18 and VICTOR C. OLIVADOTI,
Plaintiffs,

v.

THE NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND, *et al.*,
Defendants.

PROPOSED ORDER

Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment having come before this Court and having been duly and thoroughly considered, it is hereby

ORDERED that Defendants' Motion ~~for Judgment on the Pleadings or in the Alternative~~ for Summary Judgment be and the same hereby is GRANTED, that this case be and hereby is DISMISSED, ~~and that the Defendants be granted their costs and reasonable attorneys fees for defending this action~~.

Entered: May 31, 1989

/s/ Neil G. McCurn
United States District
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Case Number: 89-CV-0048

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
JOINT COUNCIL 18, *et al.*,

v.

THE NEW YORK STATE TEAMSTERS COUNCIL
HEALTH AND HOSPITAL FUND, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants motion for SUMMARY JUDGMENT is GRANTED, and this case is DISMISSED.

Date: June 28, 1989

J. R. SCULLY
Clerk

/s/ William T. Kaminska
WILLIAM T. KAMINSKA
(By) Deputy Clerk

APPENDIX C

TRUST AGREEMENT

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND

Preamble

WHEREAS, a trust agreement was made and entered into on the 9th day of June 1952 by and between the New York State Teamsters Council, a voluntary unincorporated association, hereinafter referred to as the "Council" and various Employers in the State of New York who now are, then were, or will hereinafter become parties to collective bargaining agreements with the said Council or participating local Unions and who then had, now have, or will hereinafter agree to be bound by this Trust Agreement, hereinafter called "Employers", and

WHEREAS, the New York State Teamsters Council Fund was established pursuant to such original Trust Agreement of June 9th, 1952 and has continued in operation from that time to the present; and,

WHEREAS, it appears advantageous to codify all previous changes and Amendments into one Instrument as amended; and

WHEREAS, the undersigned constitute the signatories to such original Trust Agreement and its Amendments from time to time, and all the remaining Trustees or their successors under the terms of such Trust Agreement, it is agreed in consideration of the premises and of the mutual promises and covenants made by each of the parties in the original agreement and hereto each to the other, as follows:

ARTICLE I

Organization

Section 1. There is hereby created and continued in existence the "NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND".

Section 2. The purposes of said trust fund shall be to promote, develop and administer a program which shall provide for the payment under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion, of welfare benefits for the employees of contributing employers under the terms of a collective bargaining agreement or agreements between such contributing employers and the New York State Teamsters Council and/or local unions affiliated or participating with the said New York State Teamsters Council, including death benefits, health and accident coverage, hospitalization, surgical benefits and proper medical and dental care. Any part or all of the above welfare benefits, with the exception of death benefits, may be extended to the dependents of such employees, under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion. Any local union may be considered as a contributing employer for its employees, and officers and business agents. Also considered as employers for their employees shall be the New York State Teamsters Council Health and Hospital Fund and the New York State Teamsters Conference Pension and Retirement Fund.

Section 3. The said trust fund shall be administered by a Board of Trustees, hereinafter designated as the "Trustees". There shall be equal representation of employees and employers in the administration of such Trust Fund. The trustees hereunder shall be eight (8) in number unless and until a different number shall be fixed by the Trustees as hereinafter provided, and thereafter shall be such number as shall be fixed from time to time by the Trustees; and the Trustees herein named shall continue to constitute the original Trustees thereunder.

Section 4. That, notwithstanding the said name and designation of "New York State Teamsters Council

Health and Hospital Fund" title to the entire Trust Estate or Fund and the absolute control thereof shall, at all times, be vested in the Trustees; and all obligations incurred by, or in behalf of, the Trustees, shall be obligations of the trustees only, and not of the members of the Union or Unions nor of the International Union to which said Union or Unions is affiliated nor of the New York State Teamsters Council as such, but enforcible only against the Trustees, and then only to the extent of the Trust Estate in their hands and possession and never against them or any of them in their individual capacity or capacities; nor shall such obligations be considered obligations of the Employers either collectively or individually.

Section 5. The original trustees under this Amended Trust Agreement shall be Rocco F. DePerno, Fred Maggio, Nicholas Robilotto, and Donald Wells, who are representatives of and chosen by the New York State Teamsters Council and Thomas R. Blando, Raymond Ryan, Gordon R. Tooley and Henry J. Tuffley, who are representatives of and chosen by the contributing Employers herein.

Section 6. The eight (8) Trustees names herein and who are at the present time holding office as such Trustees for four year terms respectively, are the following:

Donald Wells and William H. Mosley, Sr. to June 30th, 1977;

Rocco F. DePerno and Thomas R. Blando to June 30th, 1980;

Paul Gambaoroto and David Quidort to June 30th, 1979; and

Josiah M. Wills and Nicholas Robilotto to June 30th, 1978

and they shall continue to hold office as Trustees to the end of such term. The term of office of each successor trustee shall be four (4) years. Successor trustees representing the employees shall be chosen in accordance with the rules and regulations of the New York State Teamsters Council and shall automatically replace themselves at the end of their regular terms every four (4) years for a like term unless removed by the said New York State Teamsters Council. The Board of Trustees as a whole shall determine from time to time what employer group or groups shall elect successor employer trustees or fill vacancies in employer trustees, whether caused by death or otherwise. Such group or groups must, however, consist only of contributing employers to the Trust Fund, and no employer who is not a contributor to the said Trust Fund may vote for such employer trustees. The employer trustees shall automatically replace themselves at the end of their regular term every four (4) years unless removed by the employer group or groups designated by the Board of Trustees as provided herein.

Trustees can only be removed from office for malfeasance in office or for any other reason specifically provided in the by-laws of the Board of Trustees, and the Board as a whole is the sole judge of the qualifications of each Trustee. Title to all Trust property shall vest in such Trustees as joint tenants, and in the event of the removal or substitution of a Trustee, shall be transferred to the new Trustees appointed or designated in accordance with this provision, without any further act or conveyance. Notwithstanding this provision, it shall be the duty of each outgoing Trustee and of the heirs, executors or administrators of each deceased Trustee and of each continuing Trustee to execute, acknowledge and deliver such instruments or conveyance as shall be deemed by the Trustees advisable and appropriate for the purpose of confirming the title vested as aforesaid, in the Trustees then holding office.

Section 7. The Trustees established under this Trust Indenture shall serve as the named fiduciaries as required by the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"). The Trustees shall have the authority to manage and control the administration and operation of the Fund and Plan.

Section 8. The principal office of the New York State Teamsters Council Health and Hospital Fund shall be located at such places as the Trustees shall designate from time to time.

* * * *

Art. II.

Section 4. That in order to constitute a quorum for the transaction of any business, there must be present three (3) Trustees representing the contributing employers and three (3) Trustees representing the New York State Teamsters Council at any meeting or adjourned meeting.

Section 5. When a quorum is present as above defined, a unanimous votes of the remaining Trustees shall be necessary for the removal of a Trustee as provided in Article I, Section 6 of this Trust Agreement. On all other questions, no proposition, resolution or motion shall be considered carried unless an affirmative vote is cast by two-thirds of the Trustees present at such meeting. In the event that two-thirds consist of a whole number and a fraction, then a two-thirds vote shall be deemed to consist of the next highest whole number.

* * * *

APPENDIX D

AMENDMENT TO TRUST AGREEMENT OF THE NEW YORK STATE TEAMSTERS COUNCIL HEALTH & HOSPITAL FUND

Agreed to this 24th day of February, 1988, by and between the Trustees of the New York State Teamsters Council Health and Hospital Fund (the "Trustees"). The provisions hereinafter stated are formally adopted as amending the existing Trust Agreement by a two-thirds vote of the Trustees pursuant to Article IV, Section 1 of the Trust Agreement and paragraph 3 of the October 20, 1987, amendment of the Trust Agreement, and they shall control and supersede any inconsistent and ambiguous provisions of the Trust Agreement.

Effective 2/24/88, the Trust Agreement is hereby amended as follows:

(1) Article I, Section 3—delete the phrase ". . . and the Trustees herein named shall continue to constitute the original Trustees hereunder."

(2) Article I, Section 6—delete and substitute the following:

> The Trustees' names herein who are at the present time holding office as such Trustees for four-year terms respectively are the following: James M. Carlton, Everett L. Campbell, James A. Hood, Victor C. Olivadoti, John Pryshlak, Nicholas Robilotto, and Ervin Walker.
>
> The term of office of each Trustee shall be four (4) years from his/her appointment or reappointment.
>
> Trustees representing the employees shall automatically replace themselves at the end of their regular terms every four (4) years for a like term un-

less removed as required by law or by unanimous vote of the remaining existing employee Trustees.

Trustees representing employees shall cease to be Trustees in the event they cease to be either (1) an elected local union officer of a participating local union, or (2) a representative of such participating local union officially designated by such local union.

Trustees representing the employers shall automatically replace themselves at the end of their regular term every four (4) years unless removed as required by law, by a vote of two-thirds or more of the employers who contribute to the Fund, or by unanimous vote of the remaining existing employer Trustees.

Trustees representing the employers shall cease to be a Trustee in the event they cease to be either (1) an employee of a contributing employer to the Fund, or (2) an officially designated representative of such contributing employer(s) to the Fund.

In the event a vacancy exists, Trustees representing the employees shall be chosen in accordance with the following procedures:

(a) Any participating joint council shall nominate one or more candidates for the position of employee Trustee;

(b) Existing employee Trustees shall select successor employee Trustees from among the one or more candidates nominated by the said participating joint councils by a majority vote of all existing employee Trustees. In the event that a nominee does not receive a majority of the votes of all existing employee Trustees, the nominee shall be rejected;

(c) Individuals eligible to be nominated and/or selected for the position of employee Trustee must be either (1) an elected officer of a participating local

union, or (2) a representative of such participating local union officially designated by such local union;

(d) No local union shall have more than one Trustee on the Board of Trustees at any time.

In the event a vacancy exists, Trustees representing the employers shall be chosen in accordance with the following procedures:

(a) The employers who are contributing employers to the Fund shall nominate candidates for the position of employer Trustee;

(b) Existing employer Trustees shall select successor employer Trustees from among the one or more nominees chosen by the contributing employers by a majority vote of all existing employer Trustees. In the event that a nominee does not receive a majority of the votes of all existing employer Trustees, the nominee shall be rejected;

(c) Trustees representing employers shall cease to be Trustees in the event they cease to be either, (1) an employee of a contributing employer to the Fund, or (2) an officially designated representative of such contributing employer to the Fund.

Title to all Trust Property shall vest in such Trustees as joint tenants, and in the event of the removal or substitution of a Trustee, shall be transferred to the new Trustees appointed or designated in accordance with this provision without any further act or conveyance. Notwithstanding this provision, it shall be the duty of each outgoing Trustee and of the heirs, executors or administrators of each deceased Trustee and of each continuing Trustee to execute, acknowledge and deliver such instruments or conveyance as shall be deemed by the Trustees advisable and appropriate for the purpose of confirming the title vested as aforesaid, in the Trustees then holding office.

(3) Article II, Section 5—delete first sentence.

IN WITNESS WHEREOF, we the undersigned Trustees have executed this Agreement, subscribed our names as of this 24th day of February, 1988.

UNION TRUSTEES	EMPLOYER TRUSTEES
/s/ Nicholas Robilotto	/s/ John Pryshlak
/s/ Ervin M. Walker	/s/ James M. Carlton
/s/ Everett L. Campbell	

APPENDIX E

STATUTORY APPENDIX

29 U.S.C. § 186. Restrictions on financial transactions

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * * *

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of

value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, ... (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement . . . .

29 U.S.C. § 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.